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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1497

PAUL SCHMIDT, JANE W. SCHMIDT and LUMBERMENS MUTUAL CASUALTY COMPANY, a corporation, individually and as use benefitee of E. L. Harlin,

Petitioners,

vs.

ARCHER IRON WORKS, INC., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Now comes the respondent and files this, its Brief in opposition to the Petition by plaintiffs for a Writ of Certiorari to the Supreme Court of Illinois to review the judgment of the Supreme Court of Illinois entered therein on January 28, 1970.

OBJECTION TO JURISDICTION.

The appropriate jurisdictional statute is cited in support of Petitioners' contention that jurisdiction rests in this court. We deny, however, that the jurisdictional re-

quirements are present in this case and object for the reasons that will be apparent hereafter.

QUESTIONS PRESENTED.

1. Whether there is a substantial federal Constitutional question here involved.
2. Whether the Petitioners raised the alleged Constitutional issue in apt time.

STATUTES AND RULES INVOLVED.

Title 28, United States Code, Section 1257.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

SUMMARY OF POINTS AND AUTHORITIES

I.

THE PETITION FAILS TO RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION.

Equitable Life Assurance Society v. *Brown,* 187 U.S. 308, 23 S. Ct. 123, 47 L. Ed. 190.

Baltimore & C. Line v. *Redman,* 295 U.S. 654, 55 S. Ct. 890, 79 L. Ed. 1636.

Galloway v. *United States,* 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458.

Treat Mfg. Company v. *Standard Steel & Iron Company,* 157 U.S. 674, 15 S. Ct. 718, 39 L. Ed. 853.

Gunning v. *Cooley,* 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

People's Savings Bank v. *Bates,* 120 U.S. 556, 7 S. Ct. 679, 30 L. Ed. 754.

Pedrick v. *Peoria & Eastern Railroad Co.,* 37 Ill. 2d 494.

Merlo v. *Coal & Mining Co.,* 258 Ill. 328.

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Armstrong v. *Manzo,* 380 U.S. 545.

Braley v. *Gladden,* 403 F. (2d) 858 (9th Cir. 1968).

Brinkerhoff-Faris Co. v. *Hill,* 281 U.S. 673.

II.

THE SUPPOSED FEDERAL CONSTITUTIONAL QUESTION WAS NOT RAISED IN APT TIME.

Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, by Wolfson and Kurland, 1951 Ed., Sec. 76, p. 131.

STATEMENT OF FACTS.

We have no objection to a substantial part of the Statement of Facts submitted by Petitioners. Our objection is to the omissions found there. The trial court allowed that portion of defendant's post-trial motion seeking a judgment notwithstanding the verdict and conditionally denied that portion of the post-trial motion which sought a new trial. This was in accordance with the Illinois practice and raises no question which should require the consideration of this Court at this time.

Controlling facts are omitted from the Petitioners' Statement. Positive and uncontradicted evidence was received which established that Pacific Bridge Company ordered certain equipment through a factory in Kansas City, Missouri. This factor, at the direction of Pacific Bridge Company, wrote up an order sheet which appears in the record as plaintiff's exhibit 48 (Additional Abstract, Vol. II, p. 37). This order was transmitted to the defendant and, pursuant to it, a shop order was made. This appears in the record as plaintiffs' exhibit 50. (Additional Abstract, Vol. II, p. 39.) An invoice was furnished by defendant which is plaintiffs' exhibit 49. (Additional Abstract, Vol. II, p. 38.) None of these documents included a boom spout bridle, of which the alleged defective pin was a part.

Uncontradicted evidence was received that the defendant never manufactured a pin of the kind claimed by Petitioners to have been defective. The character of pin consistently manufactured by it is exemplified by the template which is defendant's exhibit 23 and the completed pin which is defendant's exhibit 22 (Additional Abstract, Vol.

II, pp. 48-49). We repeat, none of this testimony was controverted and it stands in this record uncontradicted.

Petitioners have also failed to advise the Court that in the application for leave to appeal to the Supreme Court of Illinois from the judgment of the Appellate Court of Illinois for the First District (*Schmidt* v. *Archer Iron Works, Inc.*, 98 Ill. App. 2d (82), 240 N.E. 2d 794), the *Pedrick* case (*Pedrick* v. *Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494) and the holding therein by the Supreme Court of Illinois were relied on by Respondent and the issue thus raised tendered to Petitioners. No answer to this petition was filed by Petitioners. A provision for the filing of a reply was made in Rule 315(e) of the Rules of the Supreme Court of Illinois.

In the Supreme Court of Illinois following the allowance of its petition, defendant filed an additional brief as appellant. As will appear from this brief, which is, as we understand it, before this Court, the *Pedrick* case was fully discussed and the issue raised thereby again tendered to Petitioners. A responsive brief was filed. Nowhere in their brief did Petitioners raise any question of a federal Constitutional issue, nor suggest that any such question was involved in the appeal then before the Supreme Court of Illinois. It was only after the Supreme Court had rendered its opinion and judgment that Petitioners, for the first time, sought to raise the issue which is here presented.

REASONS FOR DENYING CERTIORARI

I.

THE PETITION FAILS TO RAISE A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION.

The jurisdictional statute invoked by the Petitioners (28 U.S.C. 1257(3)) requires that a substantial federal question be raised in order to merit the attention of the Court. Prior decisional law instructs that where the question asserted is wholly formal, devoid of merit or has been foreclosed by past decisions of this Court, this Court should refuse to take jurisdiction of the litigation. *Equitable Life Assurance Society* v. *Brown,* 187 U.S. 308, 311, 23 S.Ct. 123, 47 L.Ed. 190.

It has been settled law for generations that a trial court may direct a verdict or enter judgment notwithstanding the verdict of a jury, without infringing constitutional rights to a trial by jury. It is also clear that reviewing courts may constitutionally set aside a verdict and enter judgment in favor of a party against whom the evidence is insufficient in law. The authority of trial and reviewing courts in this regard has been recognized by many leading decisions and has been incorporated in the rules of practice of both state and federal courts. *Baltimore & C Line, Inc.* v. *Redman,* 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636; *Galloway* v. *United States,* 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458; *Treat Mfg. Company* v. *Standard Steel & Iron Company,* 157 U.S. 674, 15 S.Ct. 718, 39 L.Ed. 853; and see Rule 50, Rules of Civil Procedure for the United States District Courts, and Annotation, *Judgment Notwithstanding Verdict,* 69 A.L.R. 2d 449, 470.

The fact that trial and reviewing courts may constitutionally enter judgment notwithstanding jury verdicts has led the courts of the several States and the federal judiciary to adopt guidelines or formulations which are

of assistance in determining when that authority may be exercised. The Constitution of the United States does not inquire, however, into the propriety of the language adopted by state courts in assisting state judges and practitioners in determining in which cases the direction of a verdict or entry of judgment notwithstanding a verdict, is appropriate. We believe this necessarily follows from an appreciation and regard for the immense diversity of actions brought in state courts and the rules of evidence employed by the states in day to day litigation. The best expression of this concept which we have found is in the decision of this Court in *Galloway* v. *United States,* at 319 U.S. 372, where it is said at page 395:

> "Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon 'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa. The matter is essentially one to be worked out in particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe the standard, whether it is applied under the demurrer to the evidence or on motion for a directed verdict, cannot amount to a departure from 'the rules of the common law' which the amendment requires to be followed."

By virtue of the good sense expressed in the foregoing statement, it is clear that the language in the decision of *Pedrick* v. *Peoria & Eastern R.R. Co.,* 37 Ill. 2d 494, cannot be criticized on federal Constitutional grounds. That

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decision requires that the evidence in a case be viewed in its aspect most favorable to the party whose position is attacked. However, it permits the trial or reviewing court to examine the totality of evidence admitted in the cause and to enter judgment if that evidence is overwhelmingly for one party.

The salutary effects of such an analysis are obvious. It protects the party whose case is attacked, yet avoids unjust results where, in a given case, the party seeking relief is clearly or overwhelmingly entitled to it. The *Pedrick* analysis avoids the wasteful and senseless requirement that new trials be granted *ad infinitum* where verdicts based on insufficient evidence cannot be allowed to stand.

With the exception of the statement found in *Galloway* v. *United States,* we have been unable to find that this Court favors any particular formulation of the issue on constitutional or other grounds. Indeed, in at least two decisions this Court has given voice to the same idea embodied in the *Pedrick* decision. We refer to *People's Savings Bank* v. *Bates,* 120 U.S. 556, 7 S.Ct. 679, 30 L.Ed. 754; and *Gunning* v. *Cooley,* 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720. In the latter authority the following expression is found:

> "Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury." 281 U.S., at page 94.

When faced with these authorities, we do not understand how Petitioners can seriously attack the *Pedrick* case as applying a vague and meaningless standard for the direction of verdicts or the entry of judgment notwithstanding a verdict.

Petitioners' Cases Discussed.

The authorities offered by Petitioners do not support their contention that the application of the *Pedrick* rule in this case constitutes a violation of the Fourteenth Amendment.

First, the plaintiffs obtained no "vested right" in the favorable verdicts which were received at the hands of the trial court jury. The cited case of *Adelman* v. *Adelman*, 296 N.Y.S. (2d) 999, 58 Misc. (2d) 803, was a divorce action, the substance of which we do not feel needs to be discussed at length here.

In this case the defendant claimed a vested right in a prior adjudication of limited separation by a court of competent jurisdiction in New York and contended that a statute enacted after a decree giving to a party separated for two years from his or her spouse the right to a decree for an absolute divorce, deprived her of a vested right in the prior adjudication fixing her status. The gist of the opinion was that the decree gave to the complaining party no vested right which could not be abrogated by a proper act of the legislature of the state.

The question of "vested right" is circumscribed by a hard and fast rule. Thus, "Where a case is appealed and pending the appeal the legislature changes the law upon which the action is based, the appellate court must dispose of the case under the law in force when its decision is rendered. (Cooley's Const. Lim.-2d Ed.-381.)", *Merlo* v. *Coal & Mining Co.*, 258 Ill. 328, at page 333. A party does not have a vested interest in the common law of the state in which his action is brought and the federal Constitution

is not a vehicle by which alleged erroneous decisions of the courts of a State as regards State law may be tested. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, at pp. 680-681.

The Petitioners have asserted a strained argument to the effect that the Supreme Court of Illinois has imposed by its decision a greater burden of proof upon Petitioners than was proper. This is erroneous. The Supreme Court has simply held that plaintiffs' evidence was insufficient in law to support the verdicts and this in no way amounts to an alteration of the burden of proof concept. Petitioners cite *Armstrong* v. *Manzo*, 380 U.S. 545. This case is inapt and has no real relation to the issue before this Court. The sole question before this Court there was one of notice. Otherwise stated, was sufficient notice given to the natural father of a child whose custody was in question? No other matter was before this Court. The distinction between the cited case and the one at bar is obvious.

Significantly, the Petitioners here make no claim that they have been subject to discrimination in the application of the *Pedrick* rule. This element serves to distinguish *Braley* v. *Gladden*, 403 F. (2d) 858 (9th Cir. 1968), upon which Petitioners rely. In that case the *habeas corpus* petitioner had been convicted in an Oregon state court, and in the trial proceedings the jury was not furnished with a form of verdict for a finding of "not guilty". This was held to have been a discriminatory departure from state court practice. No issue of that kind is present in this case.

II.

THE SUPPOSED FEDERAL CONSTITUTIONAL QUESTION WAS NOT RAISED IN APT TIME.

The jurisdictional statute invoked requires that questions sought to be reviewed by writ of certiorari must have been "specially set up or claimed under the Constitution." This language has been interpreted to mean that a petitioner must have raised a federal question at the earliest opportunity and preserved it throughout the state court proceedings. Otherwise stated, the state court whose judgment is sought to be reviewed must have been afforded the opportunity to consider and determine the federal question.

We have already pointed out that Petitioners had at least two opportunities to assert a Constitutional right in the Supreme Court of Illinois prior to its judgment. An examination of the petition for leave to appeal to the Supreme Court of Illinois which was filed on behalf of defendant, Archer Iron Works, will demonstrate that the *Pedrick* decision was urged as the controlling decisional law for the instant case. It was argued in that petition that the Appellate Court had misapplied the reasoning of the *Pedrick* case, and that by reason of the rule in *Pedrick*, Archer Iron Works was entitled to a reinstatement of the trial court's judgment.

Against these assertions, the Petitioners had the right to file a reply or answering brief (of substantially the same character as this Brief in opposition). No reply or answering brief was filed and at a later date the Illinois Supreme Court granted leave to appeal from the Appellate Court judgment.

A supplemental brief for Archer Iron Works, as appellant, was filed. This brief again reiterated the position

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that the *Pedrick* case required a reversal of the Appellate Court decision. The brief for Petitioners filed thereafter did not raise a constitutional question. In fact, the *Pedrick* case was listed among the Petitioners' authorities and at page 57 of Petitioners' brief Petitioners urged affirmance of the favorable verdicts "under the criteria of the Pedrick case."

From the foregoing, it is obvious that the Petitioner could not have been surprised by the application of the *Pedrick* rule by the Illinois Supreme Court in its decision in this case. The law is clear that under the circumstances shown, it was Petitioners' obligation to raise such constitutional arguments as were available to them in their brief as appellees, at the very latest.

The ruling precedents have been summarized as follows:

> "In addition, it must appear that the decision of the highest court of the state could not reasonably have been anticipated. Thus, although the state supreme court goes beyond the issues presented by the case made and places its decision upon a ground unexpected in the particular cause, the rule of the 'surprise' cases may not successfully be invoked to excuse the failure to raise the federal question prior to petition for rehearing if it appears that prior decisions of the state court foreshadowed the ruling complained of. In such case appellant is bound to anticipate the probability of a similar ruling in his own case and must raise the federal question *in limine* and properly preserve it throughout the proceedings." Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, by Wolfson and Kurland, 1951 Ed., Sec. 76, p. 131.

CONCLUSION

It is difficult to find any fault in the Opinion of the Supreme Court of Illinois which was written by Mr. Justice Walter V. Schaefer. The Petitioners were deprived of no rights, constitutional or otherwise, by the opinion and decision of the Supreme Court of Illinois. Moreover, their delay in raising the question in apt time forfeits their right to be heard on the issue.

Respectfully submitted,

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